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No. 73-41

In the

Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM FABRYCKI,
MATTHEW ZIVICH,

Petitioners,

vs.

THE TRUSTEES OF INDIANA UNIVERSITY in their official capacity as body politic of Indiana University; JOHN W. RYAN, individually and in his capacity as President of Indiana University and former Vice President of Regional Campuses; JOSEPH LEE SUTTON, individually and in his capacity as former President of Indiana University; DEAN RUFUS REIBERG, individually and in his capacity as Acting Vice President of Regional Campus; DR. LESTER WOLFSON, individually and in his capacity as Chancellor, Indiana University at South Bend; DR. WALT RISLER, individually and in his capacity as Academic Dean, Indiana University at South Bend; PROF. DONALD SNYDER, individually and in his capacity as Director, Division of Arts and Sciences, Indiana University at South Bend; PROF. HAROLD ZISLA, individually and in his capacity as Chairman of the Art Department, Indiana University at South Bend; PROF. LARRY CLIPPER, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. CHARLES TULL, individually and in his capacity as a member of the Faculty Promotion and Tenure Commmittee; PROF. GLORIA SHAPIRO, individually and in her capacity as a member of the Faculty Promotion and Tenure Committee; PROF. WAYNE KREPLE, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. GEORGE WING, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; and THE REGIONAL CAMPUSES FACULTY PROMOTION AND TENURE BOARD,

Respondents.

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QUESTION PRESENTED FOR REVIEW

The precise question presented to the District Court and to the court below was this: Do non-tenured faculty mem-

bers have a constitutional right to a statement of the reasons and a hearing when they are not reappointed at the end of their probationary period?

STATEMENT OF THE CASE

What petitioners refer to as "state rules for eligibility for tenure" are actually criteria for re-employment with tenure. The University's Handbook provides:

> "The principle of faculty tenure imposes reciprocal responsibilities on University as a body politic and on the faculty member. The University has the responsibility of maintaining the principles of academic freedom. To discharge this responsibility, the University provides tenure in order that the faculty member may be secure to do his scholarly work. The faculty member, on his part, is obligated to maintain high standards of professional conduct, research, and teaching in the advancement of knowledge and its communication to others. * * *
> Subject to the provisions which follow, an individual appointed to the faculty shall have tenure after a probationary period of seven years unless he receives notice to the contrary. This period shall include full-time service with faculty rank at other institutions, provided similar service at Indiana University counts toward tenure in the administrative unit concerned. * * *
>
> Appointments and reappointments during a probationary period shall be limited to one year for instructors. * * *
>
> Written notice that a probationary appointment is not to be renewed shall be given according to the following rules. * * * Notice of termination after the second year of service at Indiana University shall be given not later than June 1 of the year preceding the year in which the appointment expires. * * *"
> Appendix 137, 138.

The Faculty Handbook further provides:

"After the appropriate probationary period, tenure shall be granted to those faculty members whose professional characteristics indicate that they will continue to serve with distinction in their appointed roles. The criteria for tenure and the criteria for promotion * * * are similar. Tenure will generally not be conferred unless the faculty member achieves, or gives strong promise of achieving, promotion in rank within the rank of the University. * * * The criteria for promotions include teaching, research or other creative work, and other services, administrative, professional, or academic in nature. A candidate for promotion should normally excel in at least one of the above categories and be satisfactory in the others. Promotion to any rank is a recognition of past achievement and a sign of confidence that the individual is capable of greater responsibilities and accomplishments. Opinion Seventh Circuit. Furthermore it is the general policy of institutions not to confer tenure upon a faculty member unless he is extraordinarily well qualified and also not to confer tenure when the result would be to create an overbalance of tenured faculty within a single department or within an institution. Many decisions not to grant tenure are affected by the size, composition, payroll flexibility and academic direction and thrust of the institution as well as by the characteristics of the faculty member who is eligible for tenure. Appendix 125."

ARGUMENT

Board of Regents v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701, controls these cases on the procedural due process issue.

It makes no difference whether the probationer is not reappointed in the last year of the probationary period or some one of the intermediate years. The effect is the same. Tenure is not attained. The probationer acquires no protected property right under the criteria set out on some sort of installment plan. He is no more entitled to reappointment in the last year of probation than he was in the first year. Roth was not reappointed after his first year. Petitioners were not reappointed after their seventh year. It is clear that this factual difference does not distinguish these cases from Roth and Petitioners have not so contended.

In Roth the tenure question was controlled by Wisconsin Statute. In these cases it is controlled by the Faculty Handbook. Neither conferred upon the probationer a legitimate claim of entitlement to tenure. It is even more true at Indiana University and other institutions where it is the policy not to confer tenure upon a faculty member unless he is extraordinarily well qualified and also not to confer tenure when the result would be to create an overbalance of tenured faculty within a single department or within an institution. Many decisions not to grant tenure are affected by the size, composition, payroll, flexibility, and academic direction and thrust of the institution as well as by the characteristics of the faculty member who was eligible for tenure. As the Court of Appeals said in its opinion:

"Application of these criteria is clearly dependent upon exercise of wide discretion and individual value judgments. The concept of probationary period underlines that proposition. We are unable to spell out the type of 'entitlement' to which the Supreme Court referred, 408 U.S. at 577."

Goldberg v. *Kelly*, 397 U.S. 254; 90 S. Ct. 1011, is distinguishable from *Roth* and these cases on the facts. In *Goldberg* welfare was terminated by the duly constituted authority. It was agreed that this could not be done without due process of law. The critical issue was whether due process required a pre-termination hearing as well as a post-termination hearing.

Perry v. *Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, also is distinguishable from *Roth* and these cases because in that case the faculty member had acquired *de facto* tenure and this was a property right which could not be taken from him without due process of law.

At Indiana University there is no absolute right to tenure on the part of any faculty member. Tenure does not come about automatically at the end of seven years. Much goes into a tenure decision, including the exercise of wide discretion and individual value judgments and other things beyond the control of any person or persons.

CONCLUSION

There is no new important legal question presented by the Petition. The principles announced by *Roth* clearly control the question presented by the facts of this case. Any factual distinctions between this case and *Roth* are

of minimal legal significance. The Petition should, therefore, be denied.

Respectfully submitted,

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